No. 25-5056

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD LEE BUSBY,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
Tel. (713) 743-2171
Fax 713-743-2131

Counsel for Edward Lee Busby
*Member of the Supreme Court Bar

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Counsel for Petitioner Edward Lee Busby filed his Petition for Writ of Certiorari ("Pet.") on July 3, 2025. Counsel for the State filed Respondent's Brief in Opposition ("BIO") on September 25. Counsel now file this Reply to Respondent's Brief in Opposition, responding only to those arguments and assertions which they believe merit a reply.

I. Introduction

Petitioner's primary purpose in filing this Reply is to address Respondent's claim that the question Busby has presented to this Court amounts to nothing more than a request for this Court to engage in error correction. That claim is false. The issue here is whether a state court's rejection of an *Atkins* claim grounded in

judicial opinions, rather than uncontroverted expert, clinical evaluations runs afoul of this Court's ruling in *Moore v. Texas*, 581 U.S. 1 (2017). Briefly, both the trial court and the State had an opportunity to question either of the experts retained by Petitioner and the State or other experts at the evidentiary hearing convened in the trial court. When asked ahead of that evidentiary hearing about whether experts should attend, the trial court informed the parties it did not need to hear expert testimony. Pet. at 10-11. Given that the parties were in agreement that Busby is intellectually disabled[1] and given that the trial court gave the parties no reason ahead of the hearing to believe it thought otherwise, there was no reason to believe expert testimony would be needed at the hearing.[2] As a result, the record is bereft of any opinion from any expert finding that Busby does not satisfy the currently accepted criteria for being diagnosed as being intellectually disabled. The record is similarly bereft of any opinion from any expert suggesting the methods utilized by the retained experts were not consistent with what is required by authoritative guidelines.

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[1] The District Attorney has not indicated to Counsel that he has wavered in his opinion that Busby is intellectually disabled. The Attorney General's Office, which took no part in this proceeding before Busby filed his Petition for Certiorari in this Court, apparently disagrees with the District Attorney.

[2] Because he is indigent, Busby would have to show his request for the authorization of any funds to cover expert fees and expenses associated with attending the hearing were reasonably necessary for those requests to be granted. Tex. Code Crim. art. 11.071, § 3(d).

Instead, the trial court concluded Busby was not intellectually disabled and based that on findings it derived not from experts but from other judges. *See, e.g.*, Pet. App'x at a43 (finding an adaptive behavior assessment utilized by one expert to be inappropriate based on an opinion from the Texas Court of Criminal Appeals ("CCA") and not any expert). The CCA then adopted those judicially created findings in denying Busby relief and finding he is not intellectually disabled. This is precisely what this Court stressed Texas could not do in its opinion issued in *Moore*. *Moore*, 581 U.S. at 20 (vacating a decision from the Texas Court of Criminal Appeals because it clung to a judicially created standard and rejected medical guidance). The question presented in Busby's petition does not ask the Court to merely engage in error correction, but instead asks this Court to address the CCA's apparent return to its pre-*Moore* practice of deciding *Atkins* claims by relying not on medical guidance but instead on judicial opinions.

While this Reply is otherwise concerned with Respondent's assertion that Busby's petition asks this Court to engage in error correction, Counsel believe it necessary to address the manner with which Counsel for Respondent characterizes Busby's full-scale IQ scores. Specifically, Respondent argues that Busby's Petition does not merit "this Court's attention because, even accounting for the standard error of measurement for each of Busby's scores, none reaches below 70." BIO at 16-17; *see also* BIO at i. While Respondent is correct that none of the scores "reaches below 70," the true score of the 2010 WAIS IV administered to Busby, when accounting for the standard error of measurement falls between 70 and 79, which

Respondent acknowledges. Pet. App'x at a79, BIO at 8, 10, 24. While this Court has made clear that a state errs when it imposes a bright line requirement with respect to an *Atkins* Petitioner's full-scale IQ score, neither Texas nor Florida (or any other state of which Counsel are aware), even prior to this Court's issuing its opinion in *Hall*, required a petitioner to present a score *below* 70. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 724 (2014) ("Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test"); *Ex parte Briseño*, 135 S.W.3d 1, 14 (Tex. Crim. App. 2004) (recognizing "'significantly subaverage intellectual functioning' is define as an IQ of about 70 or below"). In other words, the score which both retained experts found to represent Busby's true IQ score would have satisfied any bright-line requirement Texas had with respect to an *Atkins* petitioner's full-scale IQ score had this Court not held such bright lines to be unconstitutional eleven years ago.

However, and to be clear, Busby's Petition does not ask this Court to address the manner with which the state habeas trial court or the CCA interpreted a single IQ score. It does ask this Court to address the fact that both the state habeas trial court and the CCA disregarded the unanimous conclusion of the experts that the 2010 WAIS reflects Busby's true intelligence and that other intelligence tests administered to Busby are consistent with the 2010 measure, and substituted judicial reasoning for medical guidance in finding Busby's true intellectual functioning to be otherwise. *See* Pet. App'x at a31-37. As the reports of both Doctors McGarrahan and Martinez make clear, their belief that the 2010 administration of the WAIS-IV resulted in the most accurate measure of Busby's IQ does not rest

solely on their shared belief that the Flynn Effect should be considered when looking at scores from tests administered long after they were normed, but also takes into account what is known about the conditions in which the tests were administered, the quality of the tests themselves, and the practice effect. Respondent's assertion that Busby's argument is merely one that alleges the trial court erred in refusing to consider the Flynn effect (which Respondent believes would have constituted "manipulation") is false. *See* BIO at 22. Counsel made mention of the trial court's lack of familiarity with the so-called Flynn Effect in Busby's Petition not to convey that the trial court erred solely in not applying the Flynn Effect but simply to inform this Court about the trial court's lack of familiarity with *Atkins* claims. Compare BIO at 22 ("The only purported error Busby seems to allege is the lower court's refusal to manipulate his scores to account for the Flynn Effect.") with Pet. at 17 ("In any event, while the experts agreed that Busby's score could be reliably pegged at 74, the trial court, for no reason that appears in the record, rejected the experts' conclusions. The trial court, which neither administered its own test nor appears to understand or be familiar with the so-called Flynn effect, simply rejected by fiat a score the experts agree is reliable."); *see also* S.H.R.R. at 21 ("And what is the Flynn effect? I'm still trying to figure out that one."). Busby's argument is that the trial court erred in wholly disregarding the unanimous opinion of the experts that the most reliable measure of Busby's full-scale IQ score is the 2010 administration of the WAIS-IV, which was grounded in more than the experts' belief that is appropriate to consider the Flynn

effect. The trial court found opinions from courts (including the CCA) questioning the use of the Flynn effect and based on those opinions, and its own reasoning regarding SEMs and the practice effect, the court determined the experts could not have been correct about the scores being consistent. The court then, guided by nothing other than its own reasoning, surmises that Busby's true FSIQ (while not proposing to suggest what the score might be) must be something that makes Busby ineligible for *Atkins* relief because less than half of the scores of which the court was aware were below 75. Pet. App'x at a36 ("Accordingly, the preponderance of Busby's IQ scores shows that he does not satisfy the first element of intellectual disability.").

II. Counsel for the State could have sought (and perhaps did seek) an opinion from a second expert if it disagreed with Dr. McGarrahan's report.

While Counsel for the State, in the state court proceeding, ultimately agreed that Busby is intellectually disabled, the Tarrant County District Attorney's Office initially opposed Busby's habeas application and associated motion for stay of execution. After Busby's expert (Dr. Gilbert Martinez) finished his 2022 assessment of Busby's intelligence, Counsel for State, having a great deal of experience representing the State's interests in *Atkins* proceedings, *see* S.H.R.R. at 12 ("I did death penalty work at the Attorney General's Office for 18 years"), employed Dr. Antoinette McGarrahan to assess Busby's intelligence.[3] Counsel for the State first

[3] As this Court might recall, the Tarrant County District Attorney's Office employed Dr. McGarrahan in September 2021 (approximately 10 months before she agreed to assess Busby's intelligence) to assess whether Blaine Milam was intellectually disabled. *See* Petition at 17, *Milam v. Texas*, No. 24-6058 (U.S. Mar. 10, 2025).

informed undersigned counsel in a phone conversation on January 17, 2023, that Dr. McGarrahan believed that Busby was intellectually disabled and would soon issue a report. The State could have then sought a second opinion from a different expert, but Counsel has no reason to believe the State did so. Instead, Counsel for the State notified undersigned counsel on April 21, 2023, that Dr. McGarrahan had finished her report and had, as predicted in January, concluded that Busby is intellectually disabled. Again, the State chose not to seek a second opinion. By May 31, 2023, Counsel for the State informed undersigned counsel that she had discussed Busby's case with the elected district attorney, and the office had agreed that Busby is intellectually disabled and ineligible for the death penalty.

The State then presented Dr. McGarrahan's report at the state court evidentiary hearing. While Counsel for Respondent now attempts to minimize the State's position at the evidentiary hearing, with respect to Dr. McGarrahan's opinion, the State agreed with McGarrahan's conclusion at the hearing. *Compare* BIO at 4, 17 (characterizing McGarrahan's opinion as simply being that she could not controvert an opinion that Busby is intellectually disabled) *with* S.H.R.R. at 11-12; *see also* 2 Suppl. S.H.C.R. at 49 (State's proposed findings of fact and conclusions of law proposing the trial court conclude Busby demonstrated by a preponderance of the evidence that he is intellectually disabled). Of course, in this proceeding, the State is represented by the Attorney General's Office and not the Tarrant County District Attorney's Office. That distinction, however, should not excuse the fact that the State had an opportunity to present a report or testimony

from an expert who believed that Busby was not intellectually disabled at the evidentiary hearing convened in the trial court in 2023, but the State chose not to (apparently because it agreed with Dr. McGarrahan that Busby is intellectually disabled). To be clear, in the state court proceeding, the burden was on Busby to demonstrate by the preponderance of the evidence that he is intellectually disabled. Given that both the State's and Busby's retained experts agreed that he is intellectually disabled, this Court should find that Busby cleared that hurdle. The question now is whether the CCA should be able to ignore the unanimous opinions of the experts and instead adopt a judicially crafted rationale for finding Busby is not intellectually disabled.

III. The state habeas trial court chose not to have the experts answer the questions it apparently had about their ultimate opinion and methods.

As mentioned above, ahead of the state court evidentiary hearing the court indicated it did not desire to hear testimony from experts at the hearing and had given the parties no reason to believe the trial court had any questions for the experts or concerns with their opinions or methods. Even at the hearing, after it had become clear that the trial court questioned whether Busby is intellectually disabled, the court continued to assert the experts' presence was not needed at the hearing. *E.g.*, S.H.R.R. at 28 ("Oh, no, no, I'm satisfied with his report. I mean, you know, I think Dr. Martinez, based upon what I read on his report, did a good job.").

At some point in the three months that transpired between the evidentiary hearing and the trial court entering its findings of fact and conclusions of law, the

trial court appears to have developed questions with the experts' work. For example, as a part of his review of Busby's adaptive deficits, Dr. Martinez employed a questionnaire known as the ABAS-III to guide his interviews with Busby's two sisters. Pet. App'x at a43-44. The trial court located an opinion from the CCA, which questioned the use of the ABAS-III in that case. *See id.* It was wholly within the trial court's authority to convene a second hearing, during which he could have asked Dr. Martinez about the ABAS-III and the CCA's opinion in *Petetan*. Even if the trial court was unpersuaded by Dr. Martinez's explanation of why he believes the ABAS-III to be an appropriate measure to use, it would seem at least necessary for the court to question Martinez concerning the size of role the ABAS-III played in his prong two determination. After all, in addition to his interviews of Busby's sisters, Dr. Martinez also reviewed voluminous medical and school records, reviewed affidavits which Counsel gathered while preparing Busby's habeas petition, interviewed Busby on two occasions, and administered a battery of tests to Busby on two occasions, some of which measured Busby's adaptive behavior. The record is bereft of any explanation from Dr. Martinez about why forensic psychologists, such as himself, continue to utilize the ABAS-III, notwithstanding the CCA's hesitancy. The record is also bereft of any testimony from Dr. Martinez about what his opinion would be regarding whether Busby satisfies *Atkins*' second prong if he were to ignore the information he learned from the ABAS-III. The record lacks similar testimony from the Dr. McGarrahan, who appears to have believed the ABAS-III appropriate. *See* Pet. App'x at a81. The fault for this deficiency lies solely

with the trial court. Instead, the record contains citations to previous opinions from the CCA about the unreliability of the ABAS-III. Those citations then became the primary basis for the court's finding Busby did not satisfy *Atkins*' second prong. The decision is grounded wholly in judicial opinions and not at all on expert opinion, not on science.

Conclusion and Prayer for Relief

All of the experts (both Busby's and the State's) who have opined on whether Busby is intellectually disabled using the current medical definition have found Busby to be intellectually disabled. If there is any expert who would find otherwise, fault that that opinion is not contained in the record lies solely with the State. Instead of an opinion from an expert finding Busby is not intellectually disabled, the record contains a judicial opinion drafted by the trial court, adopted by the CCA, and grounded entirely in that court's opinions, and not expert opinions.

Petitioner requests this Court grant certiorari, vacate the CCA's March 5, 2025, Order, and remand the proceeding to that court after finding that the record affirmatively demonstrates that Busby is ineligible for execution. In the alternative, Petitioner requests this Court grant certiorari, vacate the CCA's March 5, 2025, Order, and remand the proceeding to that court with instructions to reconsider the issue of whether Busby is ineligible for execution in light of this Court's opinion issued in *Moore*.

DATE: October 7, 2025

Respectfully submitted,

/s/ David R. Dow

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
Tel. (713) 743-2171
Fax (713) 743-2131

Counsel for Edward Lee Busby
*Member of the Supreme Court Bar